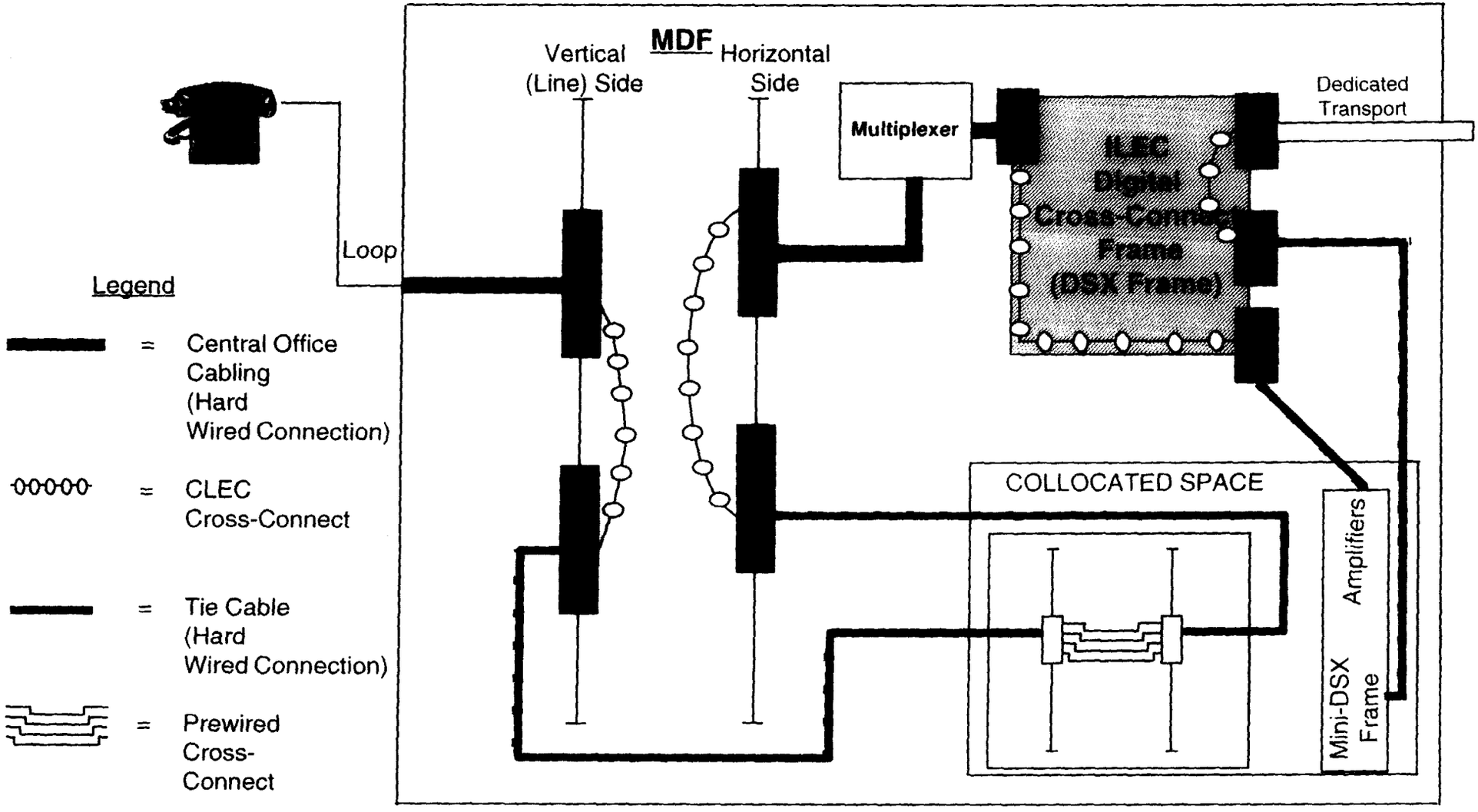
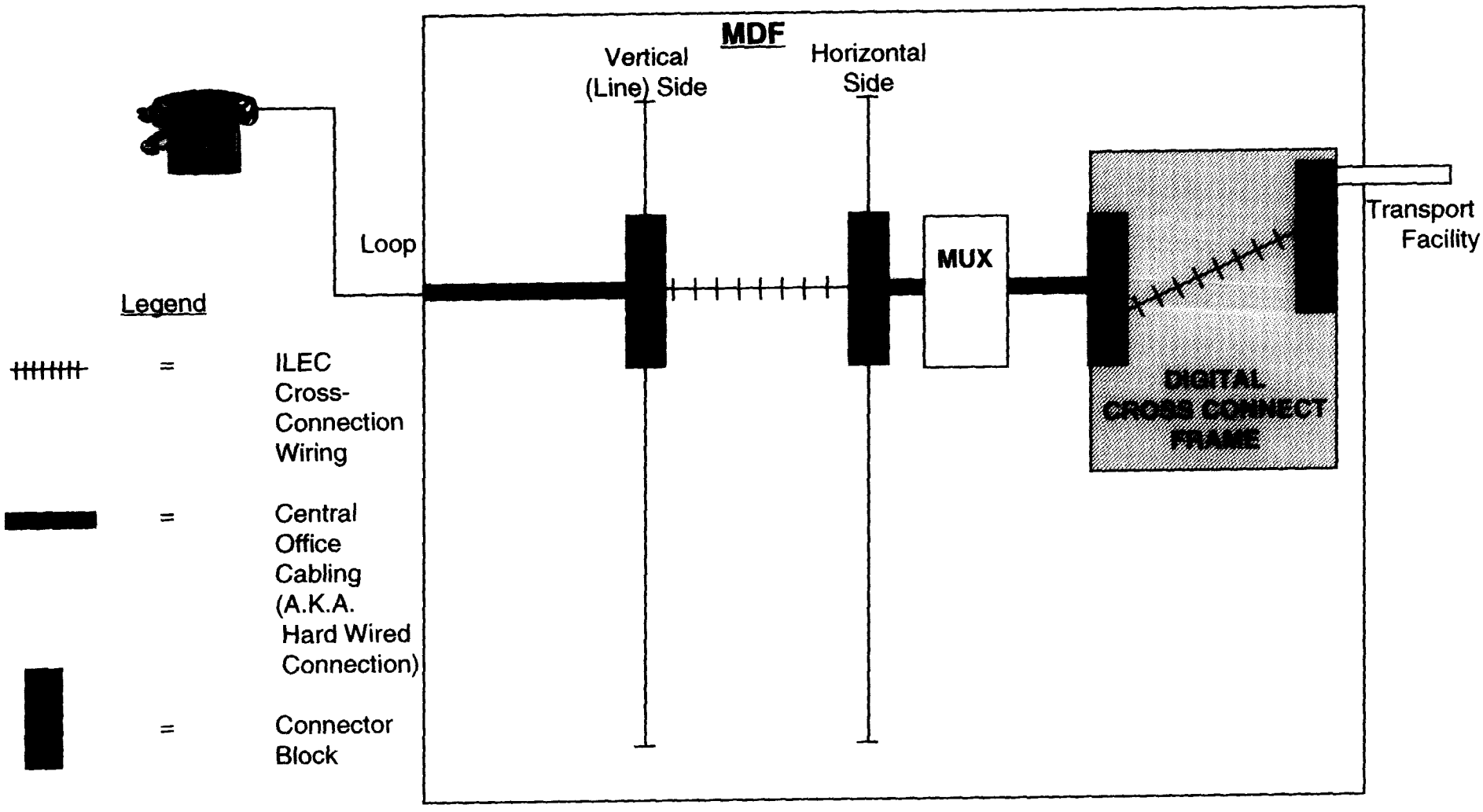
ATTACHMENT 26

Figure 7
Basic Collocation Arrangements For Reconfiguring Unbundled Loops with Dedicated Transport



ATTACHMENT 27

Figure 8
ILEC Loop And Transport Configuration



ATTACHMENT 28

Document Name: UT-960307 -- Commission Order Partially Granting Reconsideration

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration)
of an Interconnection Agreement Between) DOCKET NO. UT-960307
)
AT&T COMMUNICATIONS OF THE PACIFIC)
NORTHWEST, INC. and) COMMISSION ORDER
GTE NORTHWEST INCORPORATED) PARTIALLY GRANTING
) RECONSIDERATION
Pursuant to 47 U.S.C. Section 252.)
. . . . .)

I. INTRODUCTION

SUMMARY. In this order, the Commission concludes that it should not delete contract language obligating GTE Northwest Incorporated (GTE), to provide combinations of network elements at TELRIC This Commission uses a Total Element Long Run Incremental Cost (TELRIC) methodology in setting prices for network elements. prices for network elements.

PROCEDURAL HISTORY. The Commission issued its final order in this proceeding on August 25, 1997. In part of the order, the Commission declined to remove contract language obligating GTE to offer combinations of elements. The Commission rationale was that the issue relating to element combinations (Issue 31) addressed only the scope of AT&T Communications of the Pacific Northwest, Inc's., (AT&T) ability to combine elements rather than any obligation GTE might have to combine elements for AT&T.

GTE filed a request for Clarification or Reconsideration on
September 4, 1997. GTE asserted that it, in good faith, understood the Arbitrator's Report as requiring GTE to offer element combinations and, as a result of that understanding, GTE negotiated contract language to implement the Arbitrator's decision. GTE asks the Commission to treat the language as "arbitrated" language rather than "fully negotiated" language. In that context, the Commission would be requiring GTE to offer element combinations.

GTE then asserted that the requirement to offer element combinations violates the Eighth Circuit's July 18, 1997, decision. That decision struck some portions of the FCC'S Order No. 96-325 relating to element combinations. The Eighth Circuit, on reconsideration of its first decision, issued a second decision on October 14, 1997. The second decision struck additional portions of the FCC's order. After analyzing the second decision, the Commission called for additional briefs.

Both parties filed opening and reply briefs. GTE also filed an objection to the two exhibits AT&T attached to its reply brief. (The exhibits were copies of decisions from the Idaho and

Texas commissions.) When AT&T replied to the objection, it attached a decision from the Alabama commission. AT&T later submitted a January 28, 1998 decision from the Michigan commission. AT&T replied to GTE's objection on January 6, 1998.

STRUCTURE OF THIS ORDER. In this order the Commission first rules on the objection. It then decides whether it should treat contract provisions relating to element combinations as arbitrated language or fully negotiated language. It decides to treat the language as arbitrated, so the next section addresses the impact of the Eighth Circuit decisions on the Commission's ability to require GTE to offer combinations of elements. The Commission then considers the issue from a policy perspective and decides in favor of requiring GTE to offer element combinations.

II. GTE's OBJECTION

GTE asserts that it was unfair for AT&T to attach the decisions to its reply brief when it could have attached them to its opening brief and given GTE an opportunity to respond to them. It responds to the exhibits by asserting that factual differences make the decisions irrelevant as precedence for the Commission's decision in this case.

The "exhibits" are legal precedent rather than evidence, so they are not part of the evidentiary record and there is no basis for an evidentiary objection. There could be a fairness issue if any of the decisions were critical to this Commission's decision, but they are not. The Commission has GTE's comments on factual differences to help guide it in assessing the weight it should give to the other commissions' conclusions. (The same reasoning applies to the Michigan commission decision.) The Commission overrules the objection.

III. THE ARBITRATED/FULLY-NEGOTIATED ISSUE

In AT&T's reply to GTE's request for reconsideration, AT&T states that "[it] has never suggested that the Agreement's provisions regarding element combinations were negotiated...". There is no apparent dispute that GTE read the Arbitrator's Report as imposing an obligation to combine elements for AT&T. It would be unfair to GTE to treat the language as fully-negotiated language and it would be unfair to AT&T to strike the language as a mere proposal. The best solution is to treat it as arbitrated language and resolve the issue on its merits.

IV. THE EIGHTH CIRCUIT ISSUE

1. GTE's Argument. The Eighth Circuit's first decision vacated 47 C.F.R. 51.315(c). That subsection required incumbents to combine network elements for new entrants.

The Court, in its second decision, unambiguously ruled that an incumbent has no obligation to refrain from disassembling combinations of elements:

Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to combined) basis. Stated another way, §251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined

network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 252(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase a wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.

Iowa Utilities Board v. FCC, Order on Reconsideration, slip op. At 2 (Oct. 14, 1997) (emphasis added).

This Commission must follow the Eighth Circuit's ruling because it took effect on October 14, 1997, and the Supreme Court has not stayed it. The Eighth Circuit is the single circuit to review the FCC's Order No. 96-325. Its ruling applies nationwide.

2. AT&T's Argument. This Commission has independent state authority to:

_Prohibit GTE from separating existing element combinations unless AT&T requests separation, and

_Require GTE to enable AT&T to order combinations of elements in a single order unless AT&T requests otherwise.
The authority arises from:

_The general state policy in RCW 80.36.300(2) to "maintain and advance the efficiency and availability of telecommunications services" and RCW 80.36.300(3) to "promote diversity in the supply of telecommunications services and products" in the state.

_The specific authority in RCW 80.04.110 to determine "adequate" and "efficient" practices for telecommunications companies and also to "correct" practices that "tend to stifle" competition.

_The prohibition in RCW 80.36.170 against unreasonable prejudices and disadvantages.

The Commission should exercise its independent state authority because a failure to require GTE to offer combinations of elements would forestall competition in a way contrary to the public interest. GTE proposes to run jumpers from the main distribution frame (MDF) to the collocation space, and from the switch line card (port) to the collocation space. That would require the new entrant to cross-connect the jumpers to combine the loop with the port. The extra connections would escalate new entrant costs and create service problems.

This less efficient approach would violate the Act because:

_The Eighth Circuit ruled, in its July 18th order, that § 251(c)(3) does not require a new entrant to own or control any portion of a telecommunications network as a prerequisite to obtaining network elements.

_Section 251(c)(3) requires GTE to provide nondiscriminatory access at nondiscriminatory terms.

_47 C.F.R. § 51.311, which remains effective, requires incumbents to provide a quality of access to unbundled elements at least equal to the quality of access the incumbent provides to itself.

On the other hand, Commission action favoring AT&T would not violate the Act. Section 601(c) states that the Act does not "modify, impair, or supersede" state or local laws unless the Act specifically preempts the state or local law. Similarly § 251(d)(3) prevents the FCC from precluding state commission actions which (A) establish access and interconnection obligations, (B) are consistent with § 251; and (C) do not "substantially prevent" the FCC from implementing the Act. State commission action favoring AT&T would comply with § 261(c) because it is "necessary" to further competition and "consistent" with Congress' overall objective of a rapid transition to competitive local exchange markets.

Resolution. GTE correctly noted in its reply brief that the Eighth Circuit did not believe that it reached inconsistent results in its resolution of the "sham unbundling" issue in favor of new entrants and its resolution of the "element combinations" issue in favor of incumbents. See Iowa Utilities Bd. v. FCC, 120 F. 3d at 815. The court stated, with respect to sham unbundling, that the new entrant could obtain all of the elements for a telecommunications service from the incumbent. It then stated that, when a new entrant obtains elements from the incumbent, the Act does not require the incumbent to combine the elements into a service.

Under the Eighth Circuit's interpretation, the Act contemplates access to network elements under element pricing (e.g.TELRIC) when the new entrant, rather than the incumbent, combines the elements into services. Otherwise, the new entrant is obtaining a service for resale and the wholesale discount applies. The "carefully crafted" distinction between access to elements and resale of services ensures that incumbents receive compensation for doing the intellectual and physical work necessary to create services from elements.

Compensation is, of course, a pricing issue and state commissions, rather than the FCC, set retail rates for local services and resolve interconnection agreement disputes for element prices and wholesale discounts. 47 U.S.C. § 252(d). The Eighth Circuit's decision to vacate the FCC's combination rule makes sense because the FCC cannot ensure that the incumbent will receive compensation for the work necessary to create the combination. However, imposing that limitation on state commissions is not necessary to preserve the access/resale pricing distinction (compensation for the work necessary to combine elements) because a state commission can set element prices to ensure that the incumbent receives just compensation for creating any combinations the state may require the incumbent to offer.

As a practical matter, incumbents do not offer "sub-services" (like the local loop and port components of basic local service) for a new entrant to acquire and resell in lieu of purchasing the individual elements. It may be necessary for the state commission to require incumbents to combine some elements because it may not be technically or economically feasible for new entrants to perform that work. In those cases, the state commission would fail to achieve the primary goal of the Act (competitive local exchange markets) if it did not require the incumbent to offer the combination. It does not make sense to construe the Eighth Circuit's decision as prohibiting state commissions from achieving the overall goal of the Act when they have the ability to do so without thwarting the secondary goal of the access/resale pricing distinction.

State commissions, unlike the FCC, also have authority under the Act to implement state policies to the extent the policies are consistent with the Act. This commission has an obligation to implement Washington statutes governing quality of service and incumbent discrimination against new entrants. To the extent those statutes create a need for incumbents to offer element combinations, the Commission must require them to offer combinations to the extent the Commission is able to do so.

The following factors compel the Commission to resolve the pending issue in this proceeding by requiring GTE to combine elements from the Network Interface Device (NID), to the switch:

Feasibility. GTE's proposal to run jumpers may be "possible" to accomplish, but it is not desirable from a technological point of view because it requires extra connections (i.e. extra potential service failure points) and coordination between technicians from both companies (i.e. more potential service failure points). It also is not desirable from an economic point of view because it would increase costs for both companies. To the extent AT&T bears the extra cost, GTE's proposal would make it more difficult for AT&T to enter the market. To the extent either company passes the extra cost on to its customers, Washington's consumers will suffer.

Consistency with the Act. Rejecting GTE's proposal is consistent with the Act's access/resale distinction because the Commission can provide GTE with just compensation for the work it performs in combining the elements. Adopting GTE's approach would not be consistent with the overall goal of a rapid transition to competitive markets because it would hamper entry. The solution most consistent with the Act is to require GTE to provide the element combinations and set element prices to provide just compensation for the work GTE performs in combining the elements.

Washington's Discrimination Statute. In Washington, incumbent telephone companies are prohibited from treating themselves better than they treat new entrants. RCW 80.36.186 provides:

Notwithstanding any other provision of this chapter, no telecommunications company providing noncompetitive services shall, as to the pricing of or access to noncompetitive services, make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage. The commission shall have

primary jurisdiction to determine whether any rate, regulation, or practice of a telecommunications company violates this section.

"Service" is used in its broadest and most inclusive sense.
RCW 80.04.010. Network access through the purchase of network elements is a "service" under RCW 80.36.186.

The statute essentially splits incumbents into a hypothetical wholesale operation and a hypothetical retail operation. The wholesale operation may not discriminate against a new entrant either with respect to another new entrant or with respect to the incumbent's retail operation. This includes providing network elements to the retail operation under more favorable terms. If the incumbent's wholesale operation provides the incumbent's retail operation with direct port connections, and connects a new entrant only through jumpers, the incumbent has violated RCW 80.36.186.

This result is consistent with 47 C.F.R. 51.311(b), which requires incumbents to provide access "at least equal in quality" to the access they provide themselves. The access that GTE proposes to provide would not be equal in quality to the access it provides to itself because it would be through jumpers rather than direct connections. GTE's proposal would violate 47 C.F.R. 51.311(b).

Quality of Service. Section 252(e)(3) of the Act specifically authorizes state agencies to enforce state quality of service standards. This commission regulates the quality of service provided by telephone companies in accordance with RCW 80.36.300, which provides:

The legislature declares it is the policy of the state to:

(1) Preserve affordable universal telecommunications service;

(2) Maintain and advance the efficiency and availability of telecommunications service;

(3) Ensure that customers pay only reasonable charges for telecommunications service;

(4) Ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies;

(5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state; and

(6) Permit flexible regulation of competitive telecommunications companies and services.

It would be particularly difficult for the Commission to implement the policies set forth above under GTE's proposal:

Efficiency and Availability. GTE's proposal would make competitive telecommunications services less efficient because it requires the use of jumpers. It would make competitive services less available because logistical problems arising from the use of jumpers would put customers out of service for a period of time long enough to discourage customers from switching to AT&T's services. This would violate RCW 80.36.300(2).

Prices. By hampering competitive entry, GTE's proposal would reduce the pressure that competition puts on prices. It would tend to produce unnecessarily high prices for Washington consumers. This result would be inconsistent with RCW 80.36.300(3).

Diversity of Services. By hampering competitive entry, GTE's proposal would make it more difficult for the Commission to promote diversity in the supply of telecommunications products and services. This result would violate the policy set forth in RCW 80.36.300(5).

Regulatory Flexibility. To the extent GTE's proposal slowed the transition to competitive markets, it would slow the transition to more flexible regulation. This result would be inconsistent with RCW 80.36.300(6).

While it is impossible to determine at this point which specific state service quality standards GTE's proposal would violate, it is particularly likely to violate WAC 480-120-500(1). That rule obligates both companies to design, construct, maintain, and operate their facilities to ensure continuity of service, uniformity in the quality of service, and safety to people and property. The additional potential service failure points resulting from GTE's proposal would make the task of meeting the state's quality of service goals more difficult. GTE's proposal is not consistent with Washington's telecommunications policy goals and is hereby rejected.

V. CONCLUSIONS OF LAW

1. The Commission should overrule GTE's objection.

2. The Commission should grant GTE's request for reconsideration and treat contract language relating to element combinations as arbitrated language.

3. The Eighth Circuit's decisions do not prevent the Commission from requiring GTE to offer element combinations.

4. GTE's proposal is not consistent with the 1996 Act and is not consistent with Washington's telecommunications policy goals.

5. The Commission should reject GTE's proposal and decline to strike Section 32.5 of the contract or any other language obligating GTE to provide combinations of elements.

O R D E R

THE COMMISSION ORDERS that:

1. Section 32.5 of the contract, and the other language obligating GTE Northwest Incorporated to provide combinations of elements, shall remain in the contract.

2. In the event that the parties revise, modify, or amend the agreement, the revised, modified, or amended agreement shall be a new negotiated agreement under the Act and the parties shall submit it to the Commission for approval, pursuant to 47 U.S.C. § 252(e)(1) and relevant state law, before the agreement takes effect.

DATED at Olympia, Washington and effective this 16th day of March 1998.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANNE LEVINSON, Chair

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

ATTACHMENT 29

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Motions of AT&T Communications of the Southern States, Inc., and MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., to compel BellSouth Telecommunications, Inc., to Comply with Order No. PSC-96-1579-FOF-TP and to set non-recurring charges for combinations of network elements with BellSouth Telecommunications, Inc., pursuant to their agreement.	DOCKET NO. 971140-TP ORDER NO. PSC-98-0810-FOF-TP ISSUED: June 12, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

APPEARANCES:

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On behalf of BellSouth Telecommunications, Inc.

Tracy Hatch, Esquire, and Marsha Rule, Esquire, 101 North Monroe Street, Suite 700, Tallahassee, Florida 32301-1549, and Thomas A. Lemmer, Esquire, McKenna & Cuneo, 370 17th Street, Denver, Colorado 80202-1370
On behalf of AT&T Communications of the Southern States, Inc.

Richard D. Melson, Esquire, Hopping Green Sams and Smith, P.A., Post Office Box 6526, Tallahassee, Florida 32314
On behalf of MCI Telecommunications Corporation, and MCI Metro Access Transmission Services, Inc.

Thomas K. Bond, Esquire, 780 Johnson Ferry Road, Suite 700, Atlanta, Georgia 30342
On behalf of MCI Telecommunications Corporation

Charles J. Pellegrini, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff

FINAL ORDER RESOLVING INTERCONNECTION AGREEMENT DISPUTES, ADDRESSING RETAIL SERVICE COMPOSITION, AND SETTING NON-RECURRING CHARGES

BY THE COMMISSION:

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ACRONYMS AND ABBREVIATIONS

ACAC	Account Customer Advocate Center
Act	47 U.S.C. § 1 et seq., Communications Act of 1934 as amended by the Telecommunications Act 1996
AIN	Advanced Intelligence Network
ALEC	Alternative Local Exchange Carrier
AT&T	AT&T Communications of the Southern States, Inc.
BellSouth	BellSouth Telecommunications, Inc
CGI	Common Gateway Interface
CO	Central Office
CPG	Circuit Provisioning Group
DA	Directory Assistance
DS1	Digital Signal @ 1.544 Mbps/Digital Bipolar Signal One
Eighth Circuit	U.S. Court of Appeals for the Eighth Circuit
ESSX	Electronic Switching System Extension
FCC	Federal Communications Commission
ILEC	Incumbent Local Exchange Carrier
ISDN	Integrated Services Digital Network
IXC	Interexchange Carrier
JFC	Job Function Code

LCSC	Local Carrier Service Center
MCIm	MCI Metro Access Transmission Services, Inc. & MCI Telecommunications Corporation
NRC	Non-Recurring Charge
NRCM	Non-Recurring Cost Model
OSS	Operational Support System
PAWS	Provisioning Analyst Work Station
POTS	Plain Old Telephone System
RCMAG	Recent Change Memory Administration Group (Recent Change Line Translation Group)
SSIM	Special Services Installation Maintenance

I. BACKGROUND

On June 9, 1997, in Docket No. 960833-TP, AT&T Communications of the Southern States, Inc. (AT&T), filed a Motion to Compel Compliance of BellSouth Telecommunications, Inc. (BellSouth), with certain provisions of Order Nos. PSC-96-1579-FOF-TP, PSC-97-0298-FOF-TP, and PSC-97-0600-FOF-TP, and certain provisions of its interconnection agreement with BellSouth having to do with the provisioning and pricing of combinations of unbundled network elements (UNEs). On June 23, 1997, BellSouth filed a Response and Memorandum in Opposition to AT&T's Motion to Compel Compliance. On October 27, 1997, in Docket No. 960846-TP, MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., (MCIm) filed a similar Motion to Compel Compliance. On November 3, 1997, BellSouth filed a Response and Memorandum in Opposition to MCIm's Motion to Compel Compliance.

On August 28, 1997, MCIm filed a Petition to Set Non-Recurring Charges for Combinations of Network Elements, for which this docket was opened. BellSouth filed an Answer and Response on September 17, 1997. By Order No. PSC-97-1303-PCO-TP, issued October 21, 1997, this docket was consolidated with Docket Nos. 960757-TP, 960833-TP and 960846-TP for purposes of hearing.

At our Agenda Conference on December 2, 1997, we directed that the Motions to Compel Compliance be set for hearing. Accordingly in Order No. PSC-98-0090-PCO-TP, issued January 14, 1998, this docket, now embracing the Motions to Compel Compliance, was severed from Docket Nos. 960757-TP, 960833-TP and 960846-TP.

On March 9, 1998, we conducted an evidentiary hearing. Having considered the evidence presented at hearing, the posthearing briefs of the parties, and the recommendations of our staff, our decisions are set forth below with respect to the provisioning and pricing of network element combinations, the standard to be applied to determine whether a combination of network elements constitutes a recreation of an existing BellSouth retail service, the non-recurring charges for certain loop and port combinations, and the furnishing of switched access usage data.

II. DECISIONS

A. Introduction

The parties have placed in issue in this proceeding the meaning of provisions in their interconnection agreements concerning the pricing of network elements purchased in combinations and the furnishing of switched access usage data. The decisions we make below rest on the requirements of Section 251(c) of the Act, regulatory and court decisions implementing and interpreting Section 251(c), and general principles of contract construction.

1. The Act

Section 251(c)(3) of the Act provides in part that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." Telecommunications service is defined in Section 3(a)(51) of the Act as the "offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used." Telecommunications is defined in Section 3(a)(48) as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Network element is defined in Section 3(a)(45) as "a facility or equipment used in the provision of a telecommunications service," including "features, functions, and capabilities that are provided by means of such facility or equipment."

2. Federal Communications Commission

In its First Report and Order, FCC 96-325, released August 8, 1996, in CC Docket Nos. 96-98 and 95-185, the FCC rejected the argument of BellSouth and other local exchange carriers (LECs) that carriers should not be allowed to use unbundled elements exclusively to provide services that are available at resale, because to do so would make Section 251(c)(4), and its associated pricing provision, Section 252(d)(3), meaningless. The FCC, stated at ¶331 that:

> We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors. We therefore find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity as a means to enter local phone markets.

The FCC noted that, while Section 251(c)(3) entrants will have greater opportunities to differentiate their services to the benefit of consumers than Section 251(c)(4) entrants, they will face greater risks. The FCC postulated that this distinction in risk is likely to influence entry strategies.

3. Florida Public Service Commission

In Order No. PSC-96-1579-FOF-TP, we noted our concern with the FCC's interpretation of Section 251(c)(3). We stated at pages 37-38 that:

> [s]pecifically, we are concerned that the FCC's interpretation could result in the resale rates we set being circumvented if the price of the same service created by combining unbundled elements is lower . . . .
>
> Upon consideration, although we are concerned with the FCC's interpretation of

> Section 251(c)(3) of the Act, we are applying it to this proceeding . . . Therefore, since it appears . . . that the FCC's Rules and Order permit AT&T and MCI to combine unbundled network elements in any manner they choose, including recreating existing BellSouth services, they may do so for now. However, we will notify the FCC about our concerns and revisit this portion of our order should the FCC's interpretation change.

On reconsideration in Order No. PSC-97-0298-FOF-TP at page 7, we reiterated our concern with the notion that recombining network elements to recreate a service could be used to undercut the resale price of the service, but we affirmed our decision, nonetheless, that AT&T and MCIm could combine network elements in any manner they choose. BellSouth advanced the argument that while AT&T and MCIm can combine network elements, when they are combined to recreate an existing BellSouth service, the appropriate pricing standard is found in Section 252(d)(3), and not in Section 252(d)(1). We stated further at pages 7 and 8 that:

> In our original arbitration proceeding in this docket, we were not presented with the specific issue of the pricing of recombined elements when recreating the same service offered for resale . . . .
>
> Furthermore, we set rates only for the specific unbundled elements that the parties requested. Therefore, it is not clear from the record in this proceeding that our decision included rates for all elements necessary to recreate a complete retail service. Thus, it is inappropriate for us to make a determination on this issue at this time.

In Orders Nos. PSC-97-0600-FOF-TP and PSC-97-0602-FOF-TP, approving the arbitrated agreements respectively of AT&T and MCIm with BellSouth, we refused to allow BellSouth to include language in the agreements that would have required the parties to negotiate the price of a retail service recreated by combining UNEs, provided that recombining UNEs would not undercut the resale price of the recreated service. We again expressed our concern with pricing of UNE combinations used to recreate a resold service, but we stated again that the issue of pricing UNE combinations had not been arbitrated.

4. The Eighth Circuit

In Iowa Utilities Bd. v. FCC, 120 F.3d 753 (Iowa Utilities Bd. I), the court rejected the argument that "by allowing a competing carrier to obtain the ability to provide finished telecommunications services entirely through unbundled access at the less expensive cost-based rate, the FCC enables competing carriers to circumvent the more expensive wholesale rates . . . and thereby nullifies the terms of subsection 252(c)(4)." The court ruled that:

> We conclude that the Commission's belief that competing carriers may obtain the ability to provide finished telecommunications services entirely through the unbundled access provisions in subsection 251(c)(3) is consistent with the plain meaning and structure of the Act.

120 F.3d at 815. The court approved the rationale that the costs and risks associated with unbundled access as a method of entering the local telecommunications industry make resale a distinctly attractive option. The court also vacated the FCC's pricing rules.

In Order on Petitions for Rehearing, 1997 U.S. App. Lexis 28652, slip opinion, reh'g granted in part, denied in part (Iowa Utilities Bd. II), the court did not disturb its ruling on obtaining finished services through unbundled access. The court ruled that Section 251(c)(3) unambiguously indicates that the requesting carriers themselves, not the incumbent local exchange carrier, will combine unbundled elements to provide telecommunications services. The court stated at ¶2 that:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, §251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled elements on the

> one hand and the purchase at wholesale rates of incumbent's telecommunications retail service on the other.

The court, accordingly, vacated 47 C.F.R. §51.315(b), requiring that an incumbent local exchange carrier (ILEC) not separate currently combined network elements.[1]

Thus, the current state of the law does not require ILECs to provide combined UNEs (or assembled platforms) to requesting carriers, whether presently combined or to be combined by ILECs. While requesting carriers may combine network elements in any manner of their choosing, including the recreation of existing ILEC retail services, Section 251(c)(3) of the Act requires that they purchase, and incumbents provide, network elements on an unbundled basis. Requesting carriers must combine network elements themselves and the incumbents must allow them access to their networks for that purpose. The court has reasoned that Sections 251(c)(3) and 251(c)(4) set forth two competitive entry mechanisms with significantly different costs and risks and it has rejected the argument that providing finished services through Section 251(c)(3) improperly undermines the viability of entry through Section 251(c)(4).

B. MCIm-BellSouth Interconnection Agreement

1. UNE Combinations Pricing

The issue presented is whether the MCIm-BellSouth interconnection agreement provides a pricing standard for combinations of UNEs. As set forth in this part, we conclude that the agreement provides a pricing standard for combinations of network elements that do not recreate an existing BellSouth retail service and we direct the parties to negotiate prices for those combinations that do recreate an existing BellSouth retail service.

MCIm

Principal Argument

According to MCIm, its agreement with BellSouth "directly, expressly, and unambiguously" specifies how the prices for combinations of UNEs are determined. The price for UNE

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[1]The U.S. Supreme Court granted certiorari on January 26, 1998 (Case No. 96-3321, et al).

combinations is the price of the individual UNEs minus duplicate charges and charges for services not needed. The agreement gives MCIm the right to order UNE combinations and specifically obligates BellSouth to provide such combinations. The agreement prohibits BellSouth from disconnecting elements ordered in combination and prohibits BellSouth from charging any fee for "ripping" elements apart or for connecting elements together.

MCIm witness Parker testifies that the MCIm agreement sets forth an "explicit" pricing standard for UNEs. He testifies further that Section 2.6 of Attachment III of MCIm's agreement is a key provision. Section 2.6 provides that:

> With respect to network elements, charges in Attachment 1 are inclusive and no other charges apply, including but not limited to any other consideration for connecting any network elements with other network elements.

He states that this provision means that "when MCI orders from BellSouth a connected loop and port, BellSouth can charge only for the individual UNE prices set forth in Attachment 1." He states further that this provision was negotiated. Witness Parker observes that this section is immediately preceded by Section 2.4 of Attachment III, which provides that:

> BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers.

Witness Parker further testifies that another key provision in its agreement is Section 8 of Attachment I. That section provides that:

> The recurring and non-recurring prices for Unbundled Network Elements ("UNEs") in Table 1 of this Attachment are appropriate for UNEs on an individual, stand-alone basis. When two or more UNEs are combined, these prices may lead to duplicate charges. BellSouth shall provide recurring and non-recurring charges that do not duplicate charges for functions or activities that MCIm does not need when two or more Network Elements are combined in a single order . . . .